1953
February 10

PANAYIOTIS CHR. PAPAKOKKINOS AND ANOTHER v. PAPHOS INDUSTRIES LTD.

[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(February 10, 1953)

In the matter of the Companies (Limited Liability) Laws, 1922 to 1949,

and

In the matter of the Petition of (1) Panayiotis Chr. Papakokkinos of Paphos and (2) The estate of the late Aleccos Economou of Limassol,

Petitioners,

and

In the matter of Paphos Industries Ltd., *Respondents*.

(*Civil Appeal No.* 3941.)

Application to wind up order "just and equitable" clause—Company Law No. 18 of 1922, sec. 87 (vi)—No discrimination between majority and minority of shareholders—Unauthorized borrowing ratified by subsequent resolution—Rule in Foss v. Harbottle.

In 1949 the directors of the Paphos Industries Ltd. borrowed money without authority but their action was ratified by a resolution at an extraordinary general meeting. In 1950 by following the procedure prescribed by the Companies Law, the memorandum of association of the Company was altered so as to permit the capital to be increased from 10,000 shares of £1 each to 100,000 shares by the issue of 90,000 new shares of £1 each to rank, *pari passu*, with the existing shares of the company. The articles of association were altered *inter alia* by the inclusion of a new clause, 11B, which provided that "All new shares shall in the first instance be offered to all existing members in proportion as nearly as circumstances admit to the amount of the existing shares held by them." If the existing members did not opt to buy the new shares "the directors may allot or otherwise dispose of the same to such persons and in such manner as they think fit."

The petitioners held a minority of the shares in the Paphos Industries Ltd.; they applied to wind up the company under section 87 (vi) of the Companies Law No. 18 of 1922 on the ground that the proposed issue of the shares was unjust and oppressive to the minority. The Court below refused the application.

Held: (1) Since the unauthorized borrowing was ratified by resolution, the Court would not interfere. [*Foss* v. *Harbottle* (2 Hare 461) followed.]

(2) The alteration of the articles did not unfairly discriminate between the majority shareholders and the minority. The principle laid down in *Greenhalgh* v. *Arderne Cinemas Ltd.* (1950) 2 A.E.R. 1,120 applied. Application to wind up must be refused.

Appeal dismissed.

Appeal by petitioners from the judgment of the District Court of Limassol (Petition No. 2/43).

Z. Rossides for the petitioners.

Sir Panayiotis Cacoyiannis with *J. Eliades* for the respondents.

The facts of the case appear in the judgment of the Court which was delivered by :

HALLINAN, C.J. : In this case the petitioners applied to the Court for an order to wind up the Paphos Industries Ltd. The application was refused and from that order the petitioners have appealed.

The Company was incorporated in 1943 with a share capital of 10,000 shares of £1 each. The objects of the company were very widely expressed in the memorandum of association and it was expressly provided therein that none of the objects of the company should be considered subsidiary. The company acquired premises and plant at Yeroskipos of the Cyprus Silk Filature Ltd. for the spinning of silk, and, thanks to a contract with the Ministry of Supplies, they made handsome profits on their operations in the early years. As early as April, 1944, the board of directors considered extending their operations to include the weaving of silk, and after the contract of the Ministry of Supplies terminated, it became apparent that the company's business should be extended to weaving and for this purpose more capital would be required. By a resolution of the board of the 3rd April, 1947, it was resolved that the capital should be increased to £100,000. The existing holders of 10,000 shares should receive 40,000 shares of £1 each and 50,000 shares of £1 each should be offered by the board to persons approved by it.

No action appears to have been taken pursuant to this resolution to alter the memorandum of association so as to increase the capital, but during the year 1949 a considerable amount of plant for the purpose of weaving was bought, and whereas at the end of 1948 the debt of the company amounted to some £7,000 at the end of 1949 the company owed some £38,000. Owing to this expenditure it became imperative to increase the capital and in 1950, by following the procedure prescribed by the Companies Law, the memorandum of association was altered so as to permit the capital to be increased from 10,000 shares of £1 each to 100,000 shares by the issue of 90,000 new shares of £1 each to rank, *pari passu*, with the existing shares of the company. The articles of association were altered *inter alia* by the inclusion of a new clause, 11B, which provided that : " All new shares shall in the first instance be offered to all existing members in proportion as nearly as circumstances admit to the amount of the existing shares held by them." If the existing members did not opt to buy the new shares " the directors may allot or otherwise dispose of the same to such persons and in such manner as they think fit ".

Before the capital was increased, of the 10,000 shares 2,400 (that is to say a little under one-fourth) were owned

by the petitioners; Mr. Papakokkinos had 1,400 shares and Mr. Economou (now his estate) had 1,000 shares. Mr. Economou, who was in 1947 the Managing Director of KEO, was present when the board passed its resolution of the 3rd April, 1947, but owing to his death and to the absence of Mr. Papakokkinos abroad the petitioners allege that the board of directors and the majority of the shareholders by the manner in which they altered the memorandum and articles of association in 1950, have oppressed the petitioners who are in a minority.

The application to wind up the company is brought under section 87 (vi) of the Companies Law, No. 18 of 1922 (which has since been repealed by the Companies Law, No. 7 of 1951). Section 87 (vi) provides that the Court may wind up a company if it is of opinion that it is just and equitable that the company should be wound up.

The grounds upon which the petitioners rely are mainly two: first, that the action of the board of directors in borrowing up to £38,000 was unauthorized, and, secondly, that the proposed issue of the shares is unjust and oppressive to the petitioners who constitute a minority of the shareholders.

The first point can be disposed of summarily. The unauthorized borrowing was ratified by a resolution at an extraordinary general meeting on the 4th February, 1950, and the well-known case of *Foss* v. *Harbottle* (2 Hare 461) decided that the Court does not interfere where the unauthorized acts of directors are confirmed and ratified by the majority of members of a company. We are quite satisfied that the acts of the directors were done in the honest belief that the expenditure was necessary in the interests of the company.

But it is on the other point that the petitioners chiefly rely. The petitioners obviously do not wish to subscribe to the new issue of shares; indeed, it would probably be difficult for the personal representative of Mr. Economou to buy shares in a company which cannot be described as a trustee security. If the proposal for increasing the share capital contained in the resolution of the 3rd April, 1947, were adopted, the value of the existing shares should be written up from the nominal value of £1 to £4, and existing shareholders, even if they did not subscribe to the new issue, would feel reasonably sure that they would continue to have the same proportionate interest in the company and in its dividends. A new issue of 50,000 shares would command a 5/9th interest in the company and the original 10,000 shares would command a 4/9th interest in the company. However, owing to the manner in which the memorandum and articles of association were altered in

1950, unless existing shareholders opt to purchase the new issue, they will not retain their proportionate interest in the company and its dividends. The new issue of 90,000 shares will command 9/10ths interest in the company and the original 10,000 shares will only command 1/10th interest in the company.

It has been submitted for the petitioners that the proposed issue of 90,000 shares is therefore oppressive on the minority.

The grounds upon which the Court will order the winding up under "the just and equitable" clause are set out in Palmer, 19th Edition, at page 378 and in 5 Halsbury, 2nd Edition, at page 410. The cases which have been decided under the "just and equitable" clause do not deal with the category into which the present case falls. In circumstances similar to those of the present case, the minority shareholders have, in all the decided cases which we have seen, taken proceedings to have the alteration in the memorandum and articles of association declared invalid; or, by injunction, to prevent such alteration being made; they have not applied to the Court to wind up the company.

The principle which guides the Court in deciding whether an alteration of articles is invalid was laid down in *Allen* v. *Gold Reefs of West Africa*, 1900, 1, Chancery 656. It was held by Lindley M.R. that the power of the board to alter articles by special resolution under what is section 13 of our Companies Law No. 18 of 1922 "must be exercised not only in the manner required by law, but also in effect to the benefit of the company as a whole, and it must not be exceeded." This principle was further discussed in the case of *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) & Others*, 96 Law Journal, K.B., p.104, where it was held that if the shareholders "act honestly, and if the decision is such that honest and reasonable people might come to, the fact that the Court would have come to a different decision is no ground whatever for the Court interfering." The circumstances in which a Court will interfere in the alteration of articles has been recently considered in the case of *Greenhalgh* v. *Arderne Cinemas Ltd.* (1950) 2 A.E.R. 1120. In that case the Company's articles of association provided that no shares should be transferred to a person not a member of the company so long as a member of the company was willing to purchase them at a fair value. The company by a majority of its shareholders altered the articles by providing that any member might, with the sanction of an ordinary resolution passed at any general meeting, transfer his shares to any person named in such resolution. The minority shareholders brought an action for a declaration that this alteration of the articles constituted a fraud

on them. The Court refused to interfere and dismissed the action. Sir Edmond Evershed, M.R., after referring to Shuttleworth's case said :—

> " I think the thing can in practice be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority of shareholders so as to give to the former an advantage of which the latter were deprived. When the cases are examined where the resolution has been successfully attacked, it is on that ground that it has fallen down. It is therefore not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal is for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, *prima facie*, if the corporators think it a fair offer and vote in favour of the resolution, it is no ground for impeaching the resolution because they are considering the position of themselves as individual persons."

And at page 1127 the Master of the Rolls continues :—

> " When a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form, and, so long as the proposed alteration does not unfairly discriminate in the way I have already indicated, I do not think it an objection, provided the resolution is *bona fide* passed, that the right to tender for the majority holding of shares would be lost by the lifting of the restriction. I do not think it can be said that that is such a discrimination as falls within the scope of the principle I have tried to state."

Applying the principles enunciated in Greenhalgh's case to the facts of the present case, it is clear that the alteration of the articles does not unfairly discriminate between the majority shareholders and the minority. All new shares are to be offered to existing shareholders (including the minority) in the first instance. The fact that the minority are unwilling or unable (because of circumstances with which the company is not concerned) to subscribe to the new issue, is no reason for holding that the alteration of the articles and the proposed new issue discriminate unfairly between the majority and the minority of shareholders.

In our view the petitioners have failed to show that the action of the majority has been oppressive on the minority, or that it is just and equitable that the company should be wound up.

This appeal is therefore dismissed with costs of two advocates.

1953
February 24

LARNACA OIL WORKS LTD. v. THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA.

Significantly enough nothing is mentioned for the imposition of a fee in section 158. Moreover it would clearly amount to double taxation if a person is required to pay a substantial fee for his licence to keep a khan or a coffee-shop under section 158 and the same person is called upon to pay a trade or professional licence as a coffee-shop keeper or a khan keeper under section 159. In that case the law should be clear and unambiguous in order to lead one to the conclusion that the legislature intended from the same person for the same purpose to exact taxation twice for raising municipal revenue. The requirement of an annual licence on the payment of a nominal fee or a reasonable fee covering the expenses of periodical inspection by the Municipal Authorities of the buildings in respect of which licence is issued under section 158, might be regarded within the scope of that part of the Law; but the levy of £50 for an annual licence appears to me to be beyond the object and intention of the legislature.

1953
February 24

THE AMERICAN EXPORT LINES INC. v. THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA.

[GRIFFITH WILLIAMS, J., AND ZEKIA, J.]

(February 24, 1953)

THE AMERICAN EXPORT LINES, INC.,

Appellants,

v.

THE MAYOR, DEPUTY MAYOR, COUNCILLORS AND TOWNSMEN OF LARNACA,

Respondents.

(Civil Appeal No. 3952.)

Trade or Professional Tax—Liability of Foreign Shipping Company—Meaning of "Carrying on trade or business for profit within Municipal limits"—Municipal Corporations Law (Cap. 252) section 159.

In an action by the Municipal Authorities, Larnaca, against an American Shipping Company whose ships call at irregular intervals at Larnaca, the District Court held that the American Company was "carrying on or exercising a trade or business for profit within the municipal limits of the town of Larnaca" and had thereby rendered itself liable to the trade or professional tax set out in section 159 of the Municipal Corporations Law, (Cap. 252).